* **HIGH COURT OF DELHI : NEW DELHI**

Date of decision: 23rd August, 2007

\+ **W.P. (C) No. 5781/2007**

% M/s. Swiss Parenterals Pvt. Ltd. & anr. ...Petitioner
Through: Mr. Mrinal Madhav with Mr. Kumar Saurabh, Advocate

versus

RITES Ltd. & Others ...Respondents
Through: Mr. P.P. Malhotra, A.S.G., for UOI.
Mr. Gaurav duggal for Respondent No. 2, 3.
Mr. Maninder Singh, Ms. Pratibha M Singh, Mr.Kirtiman Singh, Mr. Ayush Agarwal, Mr. T. Singh, Advocate for the respondent No.4.

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to Reporter or not?

3. Whether the judgment should be reported in the Digest?

A.K. SIKRI,J. (Oral)

1**.** The Petitioners in this Writ Petition are challenging the action of Respondents in ignoring the bid of the Petitioner for supply of artheeter injection under International Competitive or

Bidding (ICB) and National Competitive Bidding (NCB) and accepting the bid of Respondent No. 4 even though the Petitioner had quoted the price of Rs.39.50 per unit ampule as against, the rate quoted by Respondent No. 4 of Rs.72 per unit, ampule under the ICB. Similarly, for supply of artheeter injection under the National Competitive Bidding (NCB) the bid of petitioner at the rate of Rs.35.36 per ampule was rejected while accepting the higher bid of Rs.73.84 and Rs.74.88 of IPCA Labs Ltd. and of Respondent No.4 respectively. The petitioner claims that the Respondent authorities have wrongly rejected their bids on the ground that the Petitioner did not have the requisite experience of 2 years of manufacturing and marketing the said injections.

2. The Petitioner company claims to be a WHO GMP certified company, and to be engaged in the business of manufacturing and marketing various medicine and drugs. Respondent No. 1 RITES Ltd. invited tenders on behalf of National Vector Borne Disease Control Program and Ministry of Family and Health Welfare, Government of India vide notice inviting tender dated 1.2.2007 and 9.3.2007 published in National Dailies bearing Tender Nos. IFB No. RITES/MSM/MCP/02/2006/DOM and Tender No. RITES/MSM/ MCP/02/2006 respectively for procurement of artheeter injection under (ICB) and (NCB) amongst other drugs and medicines under the National Vector Borne Disease Control

Program. It is further stated that the bids were invited in 8 schedules for artheeter injection under ICB. The total requirement of these injections were stated to be Rs.7,69,450/- ampules of injections at an estimated cost of Rs.55.40 millions. The requirement of artheeter injection under NCB was Rs.6,75,000 ampules at an estimated cost of Rs.48.60 millions.

Petitioner's Contentions

A Pre-bid Conference was held on 20th March 2007 wherein the post qualification criteria was explained to the bidders and they were informed that bids complete in all respect will only be further considered. On 23rd March 2007, the Petitioner was asked to submit documents with regard to supplies made by the Petitioner to one M/s Intas Pharmaceuticals Ltd. These documents were sent by the Petitioner. However, the Respondents were not satisfied with the same and rejected the bid of the Petitioner on the ground that it did not possess two years of experience in manufacturing and marketing the product in accordance with the qualification criteria (b) Qualifications criteria in the Tender Conditions.

3. The Petitioner made a representation and also sent a notice to the Respondent calling upon it to look into the matter. The grievance of the Petitioner is that he has been ousted from the tender process deliberately and malafidely, arbitrarily, without

any justifiable cause and reason since it was eligible and fulfilled all the terms and conditions and requirements of the NIT. The Respondent ignored the fact that it had been manufacturing artheeter injection for M/s. Themis Medicare Ltd. on loan licence basis, and these facts were repeatedly brought to the notice of the Respondents. The artheeter injection so manufactured, had been supplied under the brand name of E-MAL injection and the carton of the said injection shows M/s. Swiss Parenterals P. Ltd. as the manufacturer of the injection for Respondent No.4 M/s. Themis Medicare Limited. The inspection of the injection had been carried out at the premises of the Petitioner and, therefore, the Respondent were well aware that the Petitioner had been manufacturing the said injection. To substantiate its claim various documents have been filed including the invoice dated 5.4.2004 to show that the Petitioners have been manufacturing and marketing the specified product for considerable period and therefore has the requisite qualification.

Respondent's Contentions

The Respondents have refuted the claim of the Petitioner in their counter affidavit. The stand taken by the Respondent is that E-MAL artheeter injection which is claimed to have been manufactured by the Petitioner is the proprietary product of Respondent No. 4 and was manufactured by the

petitioner for the said Respondent under a loan licence and the Petitioner cannot therefore claim any experience in manufacturing and marketing the said product. The Petitioner's product is manufactured under the brand name S-MAL injection under a licence from the Food and Drug Control Administrator, Gandhi Nagar, which was not established to have been manufactured and marketed for a period of two years, as prescribed by the qualification condition. Under the bid document, Petitioner has offered its product under the brand S. MAL injection and therefore, it was required to give documentary evidence alongwith its bid of having manufactured and marketed the said offer product for at least 2 years as required under clause 6(i)(c) of the Inspections to Bidders which are the terms and conditions governing the tender. As per clause 6.1(2), the Petitioner was required to produce the evidence to establish that it had manufactured and marketed the specified goods covered by the bidding document for at least two years and no evidence to show requisite experience in manufacturing and marketing the said product was submitted by the Petitioner. Thus, the Petitioner failed to establish that it had been manufacturing and marketing its product S-MAL for the last 2 years.

4. The Petitioner deliberately concealed its letter dated 17.5.2007 wherein it had denied to furnish the details of user and

satisfaction report for the bid product i.e. S-MAL injection. Since the Petitioner failed to supply the documentary evidence as required the Respondent was within its right in rejecting the bid of the Petitioner.

5. Further, the Petitioner had initially in its bid indicated that S-MAL injection 1200 in number worth Rs.18,564/- were supplied to one M/s. Swiss Exports Pvt. Ltd. in August 2004, which information was subsequently modified vide letter dated 12.4.2007 to be read as 1980 in number worth Rs.39,600/- supplied in March 2004. The said M/s. Swiss Exports Pvt. Ltd. shares the address, telephone, fax and email with the Petitioner herein, which establishes that M/s. Swiss Exports Pvt. Ltd. is only a sister concern of the Petitioner and the transaction relied upon was not one at arms length and therefore could not be verified and relied upon. Moreover, the invoice issued to M/s. Swiss Exports Pvt. Ltd. also indicates that the goods were supplied to them for the purpose of export. However, the said goods were not exported by M/s. Swiss Exports Pvt. Ltd. but were supplied to one M/s. SMS Formulations Pvt Ltd. on cash payment for use in India. The said SMS Formulation Pvt. Ltd., as it appears from the invoice, operates from a Floor in a Group Housing Society and does not appears to be a genuine entity. Further, this also reveals that the goods manufactured by the Petitioner were not supplied to the

end user but were supplied to an intermediary M/s. Swiss Exports Pvt. Ltd., which in turn supplied the same to SMS Formulations Pvt. Ltd. Thus, the Petitioner miserably failed to satisfy the Respondent that it was in fact marketing the said product.

6. The Petitioner had submitted two copies of licence dated 5.9.2002 and 5.9.2003 whereas the FDA stated that the drug licence had been issued on 5.3.2003, thus there was a misrepresentation of facts by the Petitioner. Since, the past record of the bidder, with regard to the quality of the goods is essential to establish from the persons who had bought those goods in the past, the absence of past marketing experience played an important role in deciding the acceptability of the bid and the price quoted by the participants is not the sole criteria for awarding the contract. Therefore, even if the price quoted by the Petitioner was lower than that quoted by Respondent No. 4, in the absence of satisfactory past record, the contract could not have been granted to the Petitioner.

7. What was presented alongwith the Writ Petition as documents indicating the production schedule of the bid product is the schedule of the product manufactured under the loan licence of Respondent No. 4 and cannot any way be used by the Petitioner as indicating his own production plans for the good manufactured by it for its own marketing.

8. Having failed to satisfy the authority of its experience in marketing the said product for a period of 2 years, the petitioner cannot lay a claim to the contract and this petition is therefore liable to be dismissed.

9. DISCUSSION & DECISION

Since the bid has been rejected on the ground that the petitioner does not possess the requisite experience, the main question which is arising for consideration is as to whether the Petitioner fulfilled the condition of having 5 years experience as manufacturer and 2 years experience in marketing the product in question, i.e., artheeter injections.

10. It cannot be disputed that the Petitioner has the requisite experience as a manufacturer. From the facts stated above, it is clear that the Petitioner acts as the manufacturer for other loan licensees. Respondent No.4 is one of them. We may also state at this stage, that in so far as eligibility of Respondent No. 4 is concerned, (i.e. Of Manufacturing experience of 5 years and marketing of the product for the period of 2 years), the same is not in dispute. It is the case of Respondent No.4 that bulk drug is supplied by the Respondent No. 4 to the Petitioner, which is then manufactured into a specific formulation. It is also stated that even supervision is that of Respondent No. 4. It also appears from the record that in addition to undertaking the manufacturing

activity on behalf of Respondent No. 4, the Petitioner is manufacturing its product for other manufacturers also under loan licence. The Petitioner has the license of manufacturing S MAL artheeter injections. Merely because he was manufacturing this product for others having a loan licence, it cannot be said that the Petitioner did not have the capability or the requisite experience in manufacturing the product in question. He was, however, rendered ineligibility on the ground that the Petitioner does not have the requisite experience in marketing the product.

11. In these circumstances, when the Petitioner submitted its bid though he was given the benefit being a manufacturer, the Respondent No. 1 wanted to find out as to whether Petitioner has got the requisite experience in marketing as well. Most of the documents, which were initially supplied by the Petitioner alongwith its bid related to the manufacturing undertaken by it on behalf of other loan licensees.

12 Manufacturing the product for other entities under loan licence cannot be treated as marketing. The activity of marketing would entail selling the goods in the market. The Respondent No. 1 in these circumstances sent a letter dated 16.5.2007 asking the Petitioner to supply the information in respect of the marketing of the product carried out by it. In response, vide letter dated 17.5.2007, the Petitioner submitted certain documents. Though

copy of this letter dated 17.5.2007 and the documents submitted alongwith it have not been filed by the Petitioner, Respondent No. 1 has, alongwith its counter affidavit, placed these documents on record. There is a certificate issued by M/s. Swiss Exports Pvt. Ltd. dated 15.4.2004, as per which Petitioner had supplied artheeter injections to M/s. Swiss Exports Pvt. Ltd. vide invoice No.0087 dated 31.3.2004. A perusal of this certificate reveals that the same does not mention the nature of goods supplied. That apart, this letter bears the stamp of the Petitioner company though it is purportedly issued by M/s. Swiss Exports Pvt. Ltd. During the arguments, learned counsel for the Petitioner tried to explain away this fact by stating that M/s. Swiss Exports Pvt. Ltd. is its subsidiary company. However, the same does not inspires confidence, inasmuch, as even the second certificate, which has been produced, though issued by one M/s. Emcure Pharmaceuticals Ltd., the same also bears the stamp of the Petitioner where the signatures of authorised signatory are appended. Therefore, these two certificates, which were produced in response to letter dated 16.5.2007 of the Respondent No. 1 cannot be relied upon as they are the documents made by the Petitioner itself. In its second letter, no mention of the particular product, i.e., artheeter injections has been made. The matter however, does not rests here.

13 After receiving these certificates when the Respondent No. 1 wanted to find out as to whether M/s. Swiss Exports Pvt. Ltd. are making further sales etc. or not, a query was made to that effect. It appears that this query was raised primarily to find out as to whether the certificates were genuine or not. In response the Petitioner submitted one invoice issued by M/s. Swiss Exports Pvt. Ltd. in which the name of consignee is shown as SMS Formulations Pvt. Ltd., and it shows only cash sale to the said company to the tune of Rs.38,000/-. In our view, only on the basis of these documents, it cannot be said that the Petitioner has been marketing the goods in question.

14. We may point out here that it was for the Respondent No. 1 to evaluate the tender and come to conclusion as to whether the Petitioner satisfies the condition of experience of two years in marketing the product as well. The conclusion of the Respondent No. 1 on the basis of the documents, which the Petitioner has submitted, that the petitioner does not has sufficient experience was a possible conclusion. It is not proper for the court to interfere with the conclusion to which the Respondent has arrived on examining the material before it, in exercise of the powers under Article 226 of the Constitution of India and to try and substitute its own judgment for that of Expert Committee constituted for this purpose.

15. Since the Petitioner's bid was rejected on the ground that it was not eligible to make a bid, arguments that its rates were among the lowest would be of no avail. We note from the averments made by the Petitioner that pursuant to the notice inviting tender, 7 bids were received by Respondent No. 1. This included Petitioner, Respondent No. 4 and one M/s. IPCA Labs Ltd., New Delhi. After the scrutiny of the tenders, 5 bids were rejected as not *conforming to* the eligibility condition and only Respondent No. 1 and M/s. IPCA Labs Ltd., New Delhi were found to be eligible. Rates quoted by these two bidders were Rs.74.88p and Rs.73.84p respectively. M/s. IPCA Labs Ltd., New Delhi has been awarded the contract for 5 regions whereas Respondent No. 4 for three *regions* in the tender in question. The learned counsel for Respondent No. 4 has relied upon the judgment of Andra Pradesh High Court in the case of ***Swapna Constructions, Hyderabad vs. Superintending Engineer, Srisailam and another***, 2001 (1) ALT 324, and has drawn our attention to paragraph 28 thereof, which reads as under:

> "28. The learned counsel for the Petitioner contended that the price quoted by the Petitioner is the least one when compared to the other bidders and if the contract is awarded to the Petitioner, the exchequer of the Government will be benefited by twenty lakh rupees. This contention cannot be accepted because when once the Petitioner is found disqualified and ineligible for

> awarding the contract, as per the tender conditions, even if the price bid of the Petitioner is the lowest, it is not proper for this court to direct the authorities to award the contract in favour of the Petitioner. There are no grounds to order re-notification of the tender notice afresh."

To the similar effect of the judgment of Gauhati High Court in the case of ***S.K. Rai and Anr. vs. Union of India (UOI) and Ors.,*** reported as 2003 (1) ARBLR 250 (Gau), the same principal is re-stated in this judgment in para 58 thereof, which makes the following reason:

> "What crystalises from the above discussion is that the fact that tenderers bid is lowest cannot, itself, be a ground for awarding him the contract by ignoring and/or waiving the essential conditions embodied in the NIT. In other words, the authority entrusted with the responsibility of awarding the contract cannot start processing the tender documents from the standpoint of lowest bid. For being considered, a bidder must be eligible for consideration and for becoming eligible, bidder must satisfy the essential conditions of the NIT. In the case at hand, it is crystal clear that the Respondent No. 6 did not satisfy essential conditions of the NIT and was, therefore, not eligible for consideration unless the conditions were relaxed. In this regard, consistent stand of the official Respondent is that the conditions of the NIT, essential as well as general, were not relaxed. Viewed from this angle, the Respondent No. 6 was not even eligible for consideration, far less entitled to receive the contract, but even then, they have been awarded the contract on the ground of their bid being the lowest."

16. The said principle has been confirmed by the Hon'ble Supreme Court in ***Makhija Construction and Engineer Pvt. Ltd. vs. Indore Development Authority and others***, AIR (2005) SC 2499.

17. Thus, we do not find any infirmity in the decision making process or the decision arrived at by Respondent No. 1. There is no irrationality, irregularity and infirmity which will warrant interference in exercise of our powers under Article 226 of the Constitution of India. This Writ Petition is accordingly dismissed.

Stay order vacated.

Dasti.

A.K. SIKRI, J.

VIPIN SANGHI, J.

August 23, 2007
P.K. BABBAR